6-15-2012

State v. Ballard Appellant's Brief Dckt. 39242

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39242
	)	
v.	)	
	)	
WESTON LLOYD BALLARD,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Weston Lloyd Ballard appeals from the district court's order revoking his probation and executing, without reduction, the underlying unified sentence of seven years, with three years fixed, imposed and suspended upon his plea of guilty to felony DUI. On appeal, Mr. Ballard asserts that the Idaho Supreme Court has denied him due process of law and equal protection by refusing to augment the record with transcripts of his original sentencing hearing, rider review hearing, and first probation violation disposition hearing. Additionally, Mr. Ballard asserts that the district court abused its discretion when it revoked his probation and executed his original sentence without *sua sponte* reducing it.

Statement of the Facts and Course of Proceedings

This case began when Mr. Ballard was charged with felony driving while under the influence of intoxicants[1] (*hereinafter,* DUI), felony fleeing or attempting to elude a peace officer, and receiving or transferring stolen vehicles. (R., pp.49-53.) The parties then entered into a non-binding Idaho Criminal Rule 11 plea agreement under the terms of which Mr. Ballard agreed, *inter alia*, to plead guilty to DUI and to the amended charge of misdemeanor fleeing or attempting to elude an officer, in exchange for which the State would dismiss the receiving or transferring stolen vehicles charge and recommend that any sentences on the two charges to which he pleaded guilty would run concurrently. (R., pp.57-62.)

[1] The charge was elevated to a felony based on the allegation that Mr. Ballard had twice been convicted of DUI in the ten years preceding the current charge. (R., p.54.)

Pursuant to the agreement, Mr. Ballard pleaded guilty to DUI and misdemeanor fleeing or attempting to elude an officer. (R., pp.66-67.) Ultimately, the district court sentenced Mr. Ballard to a unified sentence of seven years, with three years fixed, on the DUI charge, while retaining jurisdiction.[2] (R., pp.85-86.) Following his rider, the district court suspended Mr. Ballard's sentence and placed him on a period of probation of five years. (R., p.94.) Mr. Ballard later admitted to violating the conditions of his probation, and his probation was continued with additional conditions added, including a requirement that he complete an inpatient substance abuse treatment program. (R., pp.162-66.)

Mr. Ballard was then alleged to have violated his probation as follows: by consuming alcohol, failing to attend aftercare following his completion of the inpatient treatment program, failing to complete sixty hours of community service, operating a motor vehicle without insurance and driving privileges, failing to obey all laws, changing residence without permission, failing to report to his probation officer as directed, and failing to make himself "available to supervision and program participation as instructed by the probation officer" and not actively avoid supervision. (R., pp.190-93, 205-07.)

At the evidentiary hearing, the sole witness called was Mr. Ballard's probation officer, Jennifer Adler. Ms. Adler testified that she learned from Mr. Ballard's former landlord that he had been evicted from his last known address several months earlier, and that Mr. Ballard did not report this eviction or provide a new address to the probation department.[3] (Tr., p.2, L.16 – p.3, L.11.) She further testified that, for the

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[2] The sentence received on Mr. Ballard's misdemeanor eluding charge amounted to time-served, and is therefore moot for purposes of this appeal.

[3] Defense counsel did not object to Mr. Ballard's probation officer testifying as to hearsay statements that she purportedly learned from his former landlord. *See State v. Rose*, 144 Idaho 762, 768 (2007) (a probationer enjoys a due process right to confront

months of January and February 2011, Mr. Ballard failed to report to the probation department "about every other week" and did not return her phone messages as he was supposed to do. (Tr., p.3, L.16 – p.4, L.13.)

Ms. Adler then testified that, although Mr. Ballard completed the inpatient treatment program as ordered, he failed to attend aftercare, which she learned by talking to his counselor in the program, whom she said was named either Dale or Dan.[4] (Tr., p.5, L.17 – p.6, L.17.) With respect to the allegation that Mr. Ballard had failed to complete sixty hours of community service as a condition of probation, Ms. Adler testified that she had received no documentation from Mr. Ballard that he had completed the community service. (Tr., p.6, L.18 – p.7, L.12.)

The State then withdrew the allegation that Mr. Ballard had consumed alcohol, and sought to replace the allegation that he had failed to obey all laws by driving without privileges with an allegation that he failed to obey all laws by being convicted of domestic battery and theft. (Tr., p.7, L.13 – p.8, L.2.) Defense counsel then stipulated "that he violated the law while on probation based on an incident that happened January 8th." (Tr., p.10, Ls.22-24.) The district court then found Mr. Ballard in violation of probation as to all but the withdrawn allegation. (Tr., p.15, Ls.13-16.)

At the hearing on disposition of Mr. Ballard's probation, defense counsel requested that the district court send Mr. Ballard on a rider that focused on his substance abuse problems, rather than the traditional rider in which he had previously participated. (Tr., p.18, Ls.5-22.) The State requested that the district court revoke

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witnesses absent the district court making "a specific finding of good cause" to dispense with confrontation).

[4] Again, defense counsel did not object to the use of hearsay statements purportedly made by a person the probation officer identified as either Dale or Dan in establishing a violation of this condition. *See* note 3.

probation and execute the original sentence. (Tr., p.18, L.25 – p.19, L.7.) Ultimately, the district court revoked probation, and ordered execution of the underlying sentence without reduction. (Tr., p.30, Ls.2-6.)

Mr. Ballard filed a Notice of Appeal from the district court's order revoking probation.[5] (R., p.237.)

On appeal, Mr. Ballard filed a motion to augment and suspend, requesting the preparation of transcripts of his original sentencing hearing, his rider review hearing, and the hearing on the disposition of his first probation violation proceeding. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof.) The State filed an objection to this motion. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof".) The Supreme Court then issued an order denying Mr. Ballard's motion. (Order Denying Motion to Augment and to Suspend the Briefing Schedule.)

[5] Mr. Ballard filed a Rule 35 motion requesting the reduction of the fixed portion of his sentence to two years, with an increase of the indeterminate portion to five years. That motion was not supported by new information, and, as such, is not being pursued in this appeal.

ISSUES

1. Did the Idaho Supreme Court deny Mr. Ballard due process and equal protection when it denied his motion to augment with the requested transcripts?

2. Did the district court abuse its discretion when it revoked Mr. Ballard's probation and failed to reduce his sentence *sua sponte* upon revoking probation?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Ballard Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcripts

A. Introduction

A long line of United States Supreme Court cases hold that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. The only way a court can constitutionally preclude an indigent defendant access to a requested transcript is if the State can prove that the transcript is irrelevant to the appeal.

In this case, Mr. Ballard filed a Motion to Augment, requesting various transcripts and argued that, when determining whether to revoke probation, a district court can consider all of the hearings before and after sentencing. On appeal, Mr. Ballard is challenging the Idaho Supreme Court's denial of his request for the transcripts. Mr. Ballard asserts that the requested transcripts are relevant to the district court's asserted failure to reduce his sentence upon revoking probation because that decision was made after the original sentencing hearing, and the district court could have, therefore, relied on its memory of the hearings in question when it decided to revoke probation and execute the underlying sentence. Therefore, the Idaho Supreme Court erred in denying Mr. Ballard's request.

B. The Idaho Supreme Court Denied Mr. Ballard Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcripts

1. The Idaho Supreme Court, By Failing To Provide Mr. Ballard With Access To The Requested Transcripts, Has Denied Him Due Process Because He Cannot Obtain A Merit-Based Appellate Review Of His Claims

The Constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; ID. CONST. art. I § 13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to Article I, Section 13 of the Idaho Constitution." *Maresh v. State*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is statutory. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a transcript, the cost of such transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to "order a transcript to

be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting the substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983).

The United States Supreme Court has issued a long line of cases that directly address whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with appellate records unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois*, 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost." *Griffin*, 351 at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts

themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process or equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations and footnotes omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective merits-related appellate review. At the same time, the Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet adequate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of a defendant's indigency. In that case, the state argued that the defendant had already received appellate review of his conviction by the Ohio appellate court. *Burns*, 360 U.S. at 257. The United States Supreme Court rejected this argument and ruled that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *State v. Draper*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining access to transcripts based on a frivolousness standard. "Under the present standard, . . . they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 372 U.S. 494. The Supreme Court first expanded upon its statement in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement when stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised for appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it held that a defendant need only make a colorable argument that he/she needs items to create a complete record on appeal. *Id.* at 195. If the State wants the defendant's request to be denied, it is the State's burden to prove that the requested items are not necessary for the appeal. *Id.* This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardener v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

An application of the foregoing rules to the facts of this case creates a situation analogous to *Lane v. Brown*, 372 U.S. 477 (1863). In that case, a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly in Idaho, an appellant must provide an adequate record or the appeal can be dismissed. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999). If the transcripts are missing, but the record contains court minutes, that may be sufficient so that a "meaningful review of [an appellant's] claim is possible, although the Idaho Court of Appeals has "strongly suggest[ed] that appellate counsel not rely on the district court minutes to

provide an adequate record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). In this case, Mr. Ballard presents as an issue on appeal the question of whether the district court erred by revoking his probation and by failing to *sua sponte* reduce his sentence when it revoked his probation. The transcript of the January 28, 2008, sentencing hearing is necessary because trial counsel addressed the court in mitigation. Additionally, a transcript of the September 8, 2008, probation violation admission hearing is relevant because mitigation arguments were made in favor of Mr. Ballard. (R., p.42.) If Mr. Ballard fails to provide the appellate court with the requested items, the legal presumption will apply and Mr. Ballard's claims will not be addressed on their actual merits. If it is state action alone which prevents his access to the requested items, then such action is a violation of due process, as per *Lane*, and any such presumption should no longer apply.

Mr. Ballard spoke to the district court at his sentencing hearing (R., p.83), but appellate counsel does not know what he said because this Court denied his request that transcripts of that hearing be prepared. (Order Denying Motion to Augment and to Suspend the Briefing Schedule.) He also "spoke on his own behalf" at the retained jurisdiction review hearing on March 2, 2009 (R., p.93); again, appellate counsel does not know what he said because this Court denied his request that a transcript of that hearing be prepared. (Order Denying Motion to Augment and to Suspend the Briefing Schedule.) Finally, at his previous probation violation and disposition hearing, at which the district court continued Mr. Ballard's probation, Mr. Ballard admitted to violating the terms and conditions of his probation, which demonstrate an acceptance of responsibility for his misconduct while on probation; appellate counsel does not know how much responsibility Mr. Ballard accepted or whether he addressed the district court

with respect to disposition because this Court denied his request that a transcript of that hearing be prepared. (Order Denying Motion to Augment and to Suspend the Briefing Schedule.)

All three of the requested transcripts are within an Idaho appellate court's scope of review. The transcripts are relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court appropriately revoked probation. *State v. Hanington,* 148 Idaho 26, 28 (Ct. App. 2009) ("When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.") (emphasis added). Additionally, failure to include a transcript on appeal results in the application of a presumption that the missing transcript supports the actions of the district court. *See State v. Burdett,* 134 Idaho 271, 276 (Ct. App. 2000) ("Burdett has failed to include the transcript from his change of plea hearing wherein, according to the district court minutes, he was examined by the court regarding his guilty plea. Portions of a transcript missing on appeal are presumed to support the actions of the district court.").

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny indigent defendants transcripts of proceedings on appeal. The decision to deny Mr. Ballard's Motion to Augment will render his appeal meaningless because it will be presumed that the missing transcripts support the district court's order revoking probation. This functions as a procedural bar to the review of Mr. Ballard's appellate sentencing claims on the merits, and therefore,

Mr. Ballard should either be provided with the requested transcripts, or the presumption should not be applied.

2. The Idaho Supreme Court, By Failing To Provide Mr. Ballard With Access To The Requested Transcript, Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Sixth Amendment right to counsel in the context of death penalty cases was selectively incorporated against the states through the Due Process Clause of the Fourteenth Amendment. In doing so, the United States Supreme Court reasoned that the ability to be heard by counsel is so inextricably related to due process that the denial of counsel is tantamount to the denial of a hearing. *Powell*, 287 U.S. at 64. The Supreme Court also stated that, under the facts of *Powell* "the necessity of counsel was so vital and imperative that the failure to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . [and to] hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.* at 65 (quoting *Holden v. Hardy*, 169 U.S. 366 (1898)).

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and its progeny in determining that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants with counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the protection of *Douglas* was extended to the right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal□like the promise of *Gideon* that a criminal defendant

> has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

According to the United States Supreme Court, to be constitutionally effective appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California,* 386 U.S. 738, 744 (1967). In *Anders*, the Court held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [counsel's] role as advocate requires that he support his client's interest's to the best of his ability." *Id.; see also Banuelos v. State,* 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcripts has prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is factual support either in favor of any argument made or undercutting any argument made. Therefore, Mr. Ballard has not obtained review of the court proceedings based on the merits and cannot receive the effective assistance of counsel that is guaranteed by the Constitution.

Furthermore, in *State v. Charboneau,* 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card,* 121 Idaho 425 (1991)), the Idaho Supreme Court held the starting point of evaluating whether counsel renders effective assistance of counsel in a criminal action is the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION. These standards still offer insight into the role and responsibilities of defense counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect

> the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b). In the absence of access to the requested transcripts, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's decision to revoke probation. Further, appellate counsel is unable to advise Mr. Ballard on the probable role the transcripts may play in this appeal.

Mr. Ballard is entitled to effective assistance of counsel in this appeal, and effective assistance cannot be given in the absence of access to the requested transcripts. Therefore, the Idaho Supreme Court has denied Mr. Ballard his constitutional right to due process which includes a right to the effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcripts and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Ballard's Probation And When It Failed To Reduce His Sentence *Sua Sponte* Upon Revoking His Probation

A. Introduction

Mr. Ballard asserts that the district court abused its discretion when it revoked his probation and executed the underlying sentence without *sua sponte* reducing it in light of the mitigating factors present and the district court's mistaken belief that Mr. Ballard had previously participated in two riders in this case.

B. The District Court Abused Its Discretion When It Revoked Mr. Ballard's Probation And Executed The Underlying Sentence Without *Sua Sponte* Reducing It

Two issues that arise in probation revocation proceedings and are relevant here, both of which are discretionary, are: (1) whether probation should be revoked, and (2) "if a prison sentence previously has been pronounced but suspended, should that sentence be ordered into execution or should the court order a reduced sentence as authorized by I.C.R. 35." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001) (citation omitted); *see also State v. Thomas*, 146 Idaho 592, 594 (2008) (upon revoking probation, "the court can *sua sponte* reduce the sentence pursuant to Idaho Criminal Rule 35").

At the disposition hearing on Mr. Ballard's probation violations, the district court declined to send Mr. Ballard on what would have been a second rider in this case, explaining that he had already completed two riders in this case, and concluding that it would be inappropriate to grant him "a third retained jurisdiction in this matter." (Tr., p.28, L.21 – p.30, L.1.) The district court's belief, that Mr. Ballard had previously completed two riders in this case, was incorrect. (*See generally*, R.)

At the disposition hearing, Mr. Ballard was given the opportunity to speak on his own behalf. Mr. Ballard provided a thorough and thoughtful explanation as to why he felt that his probation had been unsuccessful, including describing his attempts to abstain from alcohol as "an ongoing struggle" and his life's goal as "remain[ing] sober for the rest of my life." Mr. Ballard explained that he has "been an alcoholic probably since 12, 13 years old," having grown up in an alcoholic family, in which his immediate

and extended family, as well as people in his community,[6] regularly drank to excess. He went on to acknowledge that it was "my fault that I relapsed" and that, once he had relapsed, he figured that he had failed at his recovery and continued to relapse. He now intends to "continue to learn about alcohol and drugs so that I can overcome my addiction to be a – someway, somehow to be a positive role model in my community, especially the community out there in Fort Hall, the reservation." He concluded by noting that he needed help, and that he "could see myself in a, in a better light when I'm sober; and my thoughts and my, my thinking are clear." (Tr., p.19, L.10 – p.26, L.7.)

Mr. Ballard submitted three exhibits in support of his request that he be given another rider. One of those exhibits was a letter from his fiancée, in which she explained that she is a sober influence in his life, and explained that she supported Mr. Ballard because he "has made positive attempts on changing his lifestyle, beliefs and working to provide for, and become family oriented. He supports my 4 children as a father figure and a provider to the household." She went on to request that the district court allow him to participate in a treatment program in a local facility. (Defendant's Exhibit A.) Another exhibit was a certificate of completion for the Anger Management Course at the Fort Hall Detention Center while he was awaiting disposition on his probation violations. (Defendant's Exhibit B.)

In light of the district court's mistaken belief that Mr. Ballard had already completed two riders for this case, and the mitigating circumstances known to the district court at the time of the probation disposition hearing, Mr. Ballard asserts that the

[6] Mr. Ballard is a Native American who was raised on a reservation. (Presentence Investigation Report File, pp.1, 8.)

district court abused its discretion when it revoked his probation and failed to reduce his sentence *sua sponte* upon revoking his probation.

CONCLUSION

Mr. Ballard respectfully requests that this Court order that he be placed on probation in this case. In the alternative, he requests that this Court reduce his sentence as it deems appropriate, or remand this matter to the district court for a new probation disposition hearing.

DATED this 15th day of June, 2012.

for

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WESTON LLOYD BALLARD
INMATE # 63723
SICI
PO BOX 8509
BOISE ID 83707

DARREN B SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

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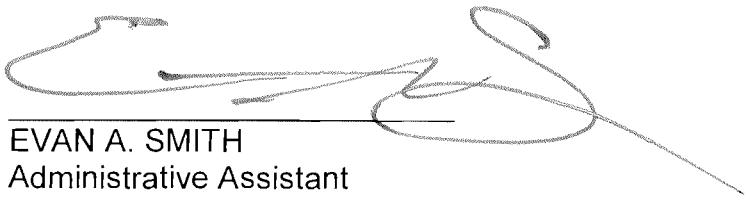

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